IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

1. STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA, Plaintiff, v. 1. TYSON FOODS, INC., 2. TYSON POULTRY, INC., 3. TYSON CHICKEN, INC., 4. COBB-VANTRESS, INC., 5. AVIAGEN, INC., 6. CAL-MAINE FOODS, INC., 7. CAL-MAINE FARMS, INC., 8. CARGILL, INC., 9. CARGILL TURKEY PRODUCTION, LLC, 10. GEORGE'S, INC., 11. GEORGE'S FARMS, INC., 12. PETERSON FARMS, INC., 13. SIMMONS FOODS, INC., and 14. WILLOW BROOK FOODS, INC., Defendants.	)	Case No. 4:05-cv-00329-JOE-SAJ

PLAINTIFF'S RESPONSE IN OPPOSITION
TO "TYSON FOODS, INC.'S MOTION TO DISMISS
COUNTS 4-10 OF THE FIRST AMENDED COMPLAINT"

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COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), by and through counsel, and respectfully submits that Defendant Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint ("Tyson Motion") is not well-taken and should be denied.[1]

I. Introduction

The State has brought suit against the Poultry Integrator Defendants, including Defendant Tyson Foods, Inc. ("Defendant Tyson Foods"), to hold them accountable for the past and continuing injury and damage to those portions of the Illinois River Watershed ("IRW") located in Oklahoma caused by the improper storage, handling and disposal of poultry waste at poultry operations for which they are legally responsible. This improper storage, handling and disposal of poultry waste has occurred, and continues to occur, both in Oklahoma and in Arkansas. Further, this improper storage, handling and disposal of poultry waste occurs at poultry operations constituting both "point sources" and "non-point sources,"[2] although it is the State's

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[1] This Memorandum in Opposition is intended to respond not only to the Tyson Motion, but also to all of the other Poultry Integrator Defendants which have joined and / or adopted the Tyson Motion.

[2] Under the Federal Water Pollution Control Act, commonly known as the Clean Water Act ("CWA"), there are two types of pollutants: "point source" pollutants and "non-point source" pollutants. A "point source" is defined in the CWA as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) Included within this definition of "point sources" are concentrated animal feeding operations ("CAFOs"). 33 U.S.C. § 1362(14). In contrast, "non-point sources" are not defined in the CWA. *American Wildlands v. Browner*, 260 F.3d 1192, 1193 (10th Cir. 2001). "Non-point source pollution has been described as nothing more than a water pollution problem not involving a discharge from a point source." *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005). With the exception of discharges from CAFOs, agricultural storm water discharges are

understanding that the number of poultry operations constituting "non-point sources" far out-number those poultry operations constituting "point sources." As will be seen below, differentiating between the two types of sources is key to a proper resolution of the Tyson Motion.

The State's First Amended Complaint ("FAC") describes in great detail the Illinois River Watershed, *see* FAC, ¶¶ 22-31, the Poultry Integrator Defendants' domination and control of the actions and activities of their respective growers, *see* FAC, ¶¶ 32-45, the Poultry Integrator Defendants' poultry waste generation, *see* FAC, ¶¶ 46-47, the Poultry Integrator Defendants' improper poultry waste disposal practices and their impact, *see* FAC, ¶¶ 48-64, and the reason for this lawsuit, *see* FAC, ¶¶ 65-69.

The basis of the Poultry Integrator Defendants' legal liability is set forth in the State's 10-count FAC. Count 1 asserts a cost recovery claim under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). *See* FAC, ¶¶ 70-77. Count 2 asserts a natural resource damages claim under CERCLA. *See* FAC, ¶¶ 78-89. Count 3 asserts a citizen suit claim under the Solid Waste Disposal Act. *See* FAC, ¶¶ 90-97. Count 4 alleges that the Poultry Integrator Defendants' conduct "constitutes a private and public nuisance under applicable state law." *See* FAC, ¶¶ 98-108. Count 5 alleges that the Poultry Integrator Defendants' conduct "constitutes a nuisance under applicable federal law." *See* FAC, ¶¶ 109-18. Count 6 alleges that the Poultry Integrator Defendants' conduct "constitutes a trespass under

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statutorily exempted as point sources under the CWA. 40 C.F.R. § 122.3(e); *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2nd Cir. 1994) (agricultural run-off is considered non-point source pollution which is exempt from the CWA); *Hiebenthal v. Meduri Farms*, 242 F.Supp.2d 885, 888 (D. Ore. 2002). A CAFO is defined under the CWA at 40 C.F.R. § 122.23.

applicable state law."[3] *See* FAC, ¶¶ 119-27. Count 7 alleges that the Poultry Integrator Defendants, "by and through their wrongful poultry waste disposal practices," have caused pollution of the land and waters within the IRW in Oklahoma in violation of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1. *See* FAC, ¶¶ 128-32. Count 8 alleges that the Poultry Integrator Defendants, "by and through those [wrongful waste disposal] practices that occurred in Oklahoma," have caused releases of poultry waste to the waters of the IRW in Oklahoma in violation of the Oklahoma Registered Poultry Feeding Operations Act and its accompanying regulations. *See* FAC, ¶¶ 133-36. Count 9 alleges that the Poultry Integrator Defendants, "by and through those [wrongful waste disposal] practices that occurred in Oklahoma," have caused releases of poultry waste to the waters of the IRW in Oklahoma in violation of the regulations of the Oklahoma Concentrated Feeding Operation Act. *See* FAC, ¶¶ 137-39. And count 10 asserts a claim against the Poultry Integrator Defendants for unjust enrichment / restitution / disgorgement. *See* FAC, ¶¶ 140-47.

The Tyson Motion seeks dismissal of counts 4 and 6-10 of the FAC to the extent the claims "pertain to activities occurring in Arkansas or pollution allegedly emanating from Arkansas" on the grounds that (1) such claims are allegedly pre-empted by the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*, and (2) the application of Oklahoma law to conduct in Arkansas allegedly constitutes "an impermissible attempt at extraterritorial regulation." Tyson

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[3] Thus, as regards counts 4 and 6, the FAC does not specify the jurisdiction of the common law it invokes or make a choice of law – although as explained in section III.A.3 of this brief the State believes Oklahoma law applies to its common law claims as regards non-point source pollution irrespective of whether the source of the pollution is located in Oklahoma or Arkansas.

Motion, p. 2.[4] Defendant Tyson Foods also seeks dismissal of count 5 of the State's First Amended Complaint on the ground that there no longer exists a federal common law of nuisance applicable to claims of interstate water pollution. Tyson Motion, p. 2.

The Tyson Motion should be denied because: (1) with respect to point source pollution the CWA action does not pre-empt the application of source-state law to source-state polluters; (2) with respect to non-point source pollution the CWA does not pre-empt the application of affected-state law to source-state polluters; (3) provided that the choice of law analysis properly calls for the application of affected-state law to source-state polluters where non-point source pollution is at issue – as it does here – the application of affected-state law does not constitute "an impermissible attempt at extraterritorial regulation;" and (4) the federal common law of nuisance applicable to claims of interstate water pollution has not been displaced where non-point source pollution is at issue.

II. Legal Standards

A. Legal standard pertaining to Fed. R. Civ. P. 12(b)(6) motions

The standard for analyzing a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is well established:

> [A]ll well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party. A 12(b)(6) motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted.

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[4] In its blunderbuss attack on the State's case, Defendant Tyson Foods apparently neglected to note the plain language of counts 8 and 9 of the FAC, thereby confusing the issues the Court must actually decide. Counts 8 and 9 are limited to "those [wrongful waste disposal] practices that occurred in Oklahoma." *See* FAC, ¶¶ 134, 135 & 138 (emphasis added). The Tyson Motion is thus irrelevant as to these two counts.

Sutton v. Utah State School for Deaf and Blind, 173 F.3d 1226, 1236 (10th Cir. 1999) (citations and quotations omitted).

"[T]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim. Granting defendant's motion to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Cottrell, Ltd. v. Biotrol International, Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999) (citations and quotations omitted). "The threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." *Robey v. Shapiro, Marianos & Cejda, LLC*, 340 F.Supp.2d 1062, 1064 (N.D. Okla. 2004) (citation and quotations omitted). "A motion to dismiss for failure to state a claim is viewed with disfavor, and is rarely granted." *Lone Star Industries, Inc. v. Horman Family Trust*, 960 F.2d 917 (10th Cir. 1992) (citation and quotations omitted).

B. Legal standard pertaining to pre-emption

Similarly, there is a presumption against finding pre-emption.[5] *International Paper Co. v. Ouellette*, 107 S.Ct. 805, 811 (1987) ("courts should not lightly infer pre-emption"). Pre-

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[5] As explained by the Supreme Court in *Gade v. National Solid Wastes Management Association*, 112 S.Ct. 2374, 2383 (1992):

> Pre-emption may be either expressed or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95, 103 S.Ct. 2890, 2899, 77 L.Ed.2d 490 (1983); *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 152-153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'" *id.*, at 153, 102 S.Ct., at 3022 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146,

emption may be found, however, "when federal legislation is 'sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.'" *International Paper,* 107 S.Ct. at 811 (citation omitted).

III. Argument

A. The CWA does not have the pre-emptive reach Defendant Tyson Foods claims it does

In order to understand the pre-emptive reach of the CWA, one first must understand the structure and history of the CWA. The Federal Water Pollution Control Act was originally enacted in 1948. Pub. Law 845. The Federal Water Pollution Control Act, now commonly known as the CWA, was extensively amended by Congress in 1972. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. Law 92-500. Specifically, "[t]he Amendments established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit." *City of Milwaukee v. Illinois ("Milwaukee II")*, 101 S.Ct. 1784, 1789 (1981) (emphasis added); *see also International Paper*, 107 S.Ct. at 810 ("One of the primary features of the 1972 amendments is the establishment of the National Pollutant Discharge Elimination System (NPDES), a federal permit program designed to regulate the discharge of polluting effluents") (emphasis added); *Middlesex County*

1152, 91 L.Ed. 1447 (1947)), and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941); *Felder v. Casey*, 487 U.S. 131, 138, 108 S.Ct. 2302, 2306, 101 L.Ed.2d 123 (1988); *Perez v. Campbell*, 402 U.S. 637, 649, 91 S.Ct. 1704, 1711, 29 L.Ed.2d 233 (1971).

There is no suggestion by Defendant Tyson Foods that the CWA contains any explicit pre-emptive language. Thus, if pre-emption is to be found, it must be of the implied variety.

Sewage Authority v. National Sea Clammers Association, 101 S.Ct. 2615, 2622 (1981) ("The Amendments shifted the emphasis to 'direct restrictions on discharges'") (emphasis added). Notably, the term "discharge of pollutants" is a defined term in the CWA meaning "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). Simply put, the 1972 amendments provided for regulation of only point sources; they did not provide for regulation of non-point sources. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 371 (10th Cir. 1979) ("Because nonpoint sources of pollution . . . are virtually impossible to isolate to one polluter, no permit or regulatory system was established as to them [under the CWA]").[6]

Under the 1972 amendments, point source pollution (in contrast to non-point source pollution) was, and continues to be, subject to a carefully devised, detailed regulatory scheme established in the CWA. Specifically, the CWA generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained a National Pollutant Discharge Elimination System ("NPDES") permit from the EPA. 33 U.S.C. § 1311(a). The CWA Act provides that the EPA may delegate to a state the authority to administer the NPDES program with respect to point sources within its state if the EPA determines that the proposed state program complies with the requirements set forth in 33 U.S.C. § 1342(b). The EPA retains authority, however, to block the issuance of any permit to which it objects. 33 U.S.C. § 1342(d). The source state of a point source discharge may require discharge limitations more stringent than those required by the EPA. 40 C.F.R. § 122.1(f).

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[6] Indeed, the 1972 Amendments merely encouraged states to develop "area-wide waste treatment management" ("AWTM") plans to identify non-point source pollution and to establish or designate an agency or other organization to develop and implement these AWTM plans, using the promise of federal grants to the states to accomplish these tasks. 33 U.S.C. § 1288; *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1096-97 (9th Cir. 1998).

In February 1987, the CWA was amended again. *See* Water Quality Act of 1987, Pub. Law 100-4. With respect to non-point source pollution, the 1987 amendments still did not set forth a federal regulatory program. Nor, contrary to the representations in the Tyson Motion, did they set forth a mandatory state regulatory program for non-point source pollution. Rather, they asked each state to (1) make a report of the navigable waters within the state with non-point source pollution problems, (2) develop a management program for controlling pollution added from non-point sources to the navigable waters within the state and improving the quality of such waters, and (3) in return, become eligible for federal grants to implement these management programs. *See* 33 U.S.C. § 1329. Significantly, however, a state was, and is, not required to participate in the CWA non-point source program. *See, e.g.*, 33 U.S.C. § 1329(d)(3) and discussion, *infra,* Section III.A.2.

1. With respect to point source pollution originating in Arkansas, the CWA pre-empts the State's claims based on Oklahoma law but not the State's claims based on Arkansas law

After a review of the comprehensive nature of the mandatory NPDES permitting program, the Supreme Court stated "we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'" *International Paper*, 107 S.Ct. at 812. Accordingly, the State does not dispute that the CWA pre-empts application of Oklahoma state common law to an out-of-state point source discharge affecting Oklahoma. *International Paper*, 107 S.Ct. at 816 ("The Act pre-empts state law to the extent that the state law is applied to an out-of-state point source").

Defendant Tyson Foods is flat wrong, however, when it asserts that "[i]n the area of water pollution from 'point sources,' the Supreme Court has ruled, in *International Paper v.*

Ouellette, 479 U.S. 481, that State law actions to remedy such pollution are preempted by the CWA." Tyson Motion, p. 5. As the Supreme Court quite clearly stated: "[N]othing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State." *International Paper*, 107 S.Ct. at 814 (emphasis in original) (relying on saving clause found at 33 U.S.C. §§ 1370 & 1365(e)); *see also Arkansas v. Oklahoma*, 112 S.Ct. 1046, 1053 (1992) ("the only state law applicable to an interstate discharge is 'the law of the State in which the point source is located'") (emphasis added) (citation omitted); Oct. 28, 2002 Order in *City of Tulsa v. Tyson Foods, Inc.*, 01-CV-0900-EA(C), N.D. Okla. (". . . the Court expressly rejected Decatur's argument that the CWA preempted plaintiffs' Arkansas common law claims"). Indeed, the Supreme Court explained that "[b]y its terms the CWA allows States . . . to impose higher standards on their own point sources, and in *Milwaukee II* we recognized that this authority may include the right to impose higher common-law as well as higher statutory restrictions. . . ."[7] *International Paper*, 107 S.Ct. at 497-98. Accordingly, the State's claims arising out of conduct by the Poultry Integrator Defendants at point sources (i.e., CAFOs) in Arkansas that has caused injury and damages to the IRW within Oklahoma are not pre-empted; rather, simply, Arkansas nuisance, trespass and unjust enrichment law applies to such claims.[8] Similarly, the State's claims arising out of conduct by the Poultry Integrator Defendants at point sources in Oklahoma are not pre-empted, but are, rather, subject to Oklahoma law.

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[7] Nor should Defendant Tyson Food be heard to argue that a party holding a permit from a regulatory authority cannot be subject to liability based upon common law claims. *See, e.g., Union Oil Company of California v. Heinsohn*, 43 F.3d 500 (10th Cir. 1994) (license or permit issued by regulator not sufficient to avoid nuisance liability).

[8] It should be noted that the fact that source-state law applies where an out-of-state point source discharge affecting interstate waters is involved does not affect venue; an action applying source-state law may be brought in the affected state. *International Paper*, 107 S.Ct. at 814-16.

2. With respect to non-point source pollution originating in Arkansas, the CWA does not pre-empt the State's claims based on Oklahoma law

The State vigorously disputes Tyson Foods' contention that the CWA pre-empts application of Oklahoma state common law to an out-of-state non-point source run-off affecting Oklahoma. In contrast to point sources, and as briefly discussed above, Congress has left any regulation of non-point sources up to the states. *See American Wildlands v. Browner*, 94 F.Supp.2d 1150, 1158 (D. Colo. 2000), *aff'd* 260 F.3d 1192 (10th Cir. 2001) (citing 33 U.S.C. § 1329). Indeed, controlling Tenth Circuit precedent makes clear that the CWA simply does not require states to implement nonpoint source regulatory programs. *See Defenders of Wildlife*, 415 F.3d at 1124-25 (". . . [T]he CWA does not require states to take regulatory action to limit the amount of non-point water pollution introduced into its waterways"); *American Wildlands*, 260 F.3d at 1197 ("nothing in the CWA demands that a state adopt a regulatory system for nonpoint sources") (citation and quotations omitted).

Furthermore, controlling Tenth Circuit precedent makes clear that the CWA does not authorize the EPA to promulgate a federal program in the absence of an adequate state program. *See American Wildlands*, 260 F.3d at 1197-98 ("In the Act, Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution. . . . [T]he Act nowhere gives the EPA the authority to regulate nonpoint source discharges"); *Defenders of Wildlife*, 415 F.3d at 1124 ("Congress clearly intended the EPA to have a limited, non-rulemaking role in the establishment of water quality standards by states") (citation and quotations omitted).[9]

[9] Defendant Tyson Foods may cite to *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1140 fn. 4 (10th Cir. 2005), wherein that court stated in a footnote, without any analysis underpinning its statement, that "[t]he CWA also regulates nonpoint source discharges." The statement in this footnote should be afforded no weight inasmuch as (1) it is entirely *dicta* inasmuch it was unchallenged that the case before the court centered on a point source, (2) it is

The limited scope of the CWA as relates to non-point sources is perhaps best summarized in the words of Senator George Mitchell, who at the time of the 1987 Amendments to the CWA served as chairman of the Senate Subcommittee on the Environment:

> There is nothing in this bill which requires any State in the country to adopt a program to deal with nonpoint source pollution. The bill provides that each State will make an assessment of the problem. If a State does not make an assessment of the problem, the EPA will make one in that State for the purpose of establishing national data on this problem. . . . After that, no State is compelled to adopt a program to control nonpoint source pollution.

133 Cong. Rec. 1568, 1571 (January 21, 1987)[10]

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entirely inconsistent with existing, established Tenth Circuit precedent, *see American Wildlands*, 260 F.3d 1192; *Defenders of Wildlife*, 415 F.3d 1121, and (3) it is, for the reasons explained herein, simply wrong inasmuch as an examination of the CWA itself reveals that it does not regulate non-point source pollution. Underscoring the error of the *El Paso Gold Mines* footnote is that it speaks in terms of "nonpoint source discharges." As noted earlier, the term "discharge of pollutants" is defined in the CWA and means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added).

[10] Defendant Tyson Foods' citation to various portions of the legislative record, when examined closely, does not support the proposition that Congress intended to foreclose state common law actions in the area of interstate non-point water pollution. In fact, these citations simply make the point that Congress did not intend state common law actions to supplant the point source regulatory program set forth in the CWA – the only type of source pollution actually regulated under the CWA. For instance, Defendant Tyson Food's citation to the remarks of Representative Hammerschmidt regarding the deletion of the proposed "savings" provision omits that portion stating that "Section 119 would have fostered State enforcement of State statutory or common law by removing impediments to Federal court jurisdiction established by Milwaukee I, II, and III." 133 Cong. Rec. 983, 987 (Jan. 8, 1987) (emphasis added). *Milwaukee I, II and III* are, of course, point source, not non-point source, pollution cases.

The remarks of Representative Hammerschmidt concerning the deletion of Section 119 from the conference version of the bill are similarly revealing: "I am pleased that the conferees deleted provisions in each bill related to savings clauses and other statutes. As a result, the Water Quality Act of 1987 does not in any way affect the well-established rulings of Milwaukee I, II, and III involving the Clean Water Act. Taken together, these decisions hold that, in interstate water pollution disputes, a downstream plaintiff State may not apply Federal common law nor the State common law or statutory law of the downstream State against an upstream State with EPA-approved water pollution control requirements." 133 Cong. Rec. 983, 986-87 (Jan. 8, 1987)(emphasis added). As discussed above, the 1987 amendments did not include non-point source pollution requirements.

Against this backdrop of authority, it strains credibility to argue that the CWA pre-empts the State's Oklahoma law causes of action pertaining to non-point source pollution emanating from Arkansas and causing injury and damage in Oklahoma. As noted previously, "courts should not lightly infer pre-emption," and pre-emption may only be found "when federal legislation is 'sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.'" *International Paper,* 107 S.Ct. at 811 (citation omitted). In contrast to the CWA's mandatory program for point-source pollution, the CWA's permissive program pertaining to non-point source pollution in the CWA can hardly be characterized as "sufficiently comprehensive" such that pre-emption would be triggered. Likewise, because the CWA does not set forth any required standards or methods to control non-point source pollution, it can hardly be said that the imposition of Oklahoma common law standards to non-point source pollution that is running off in Arkansas and causing injury and damages in Oklahoma would "interfere[] with the methods by which the federal statute was designed to reach [the goal of eliminating water pollution]." *See International Paper*, 107 S.Ct. at 813 (noting that imposition of Vermont law against the New York-based International Paper plant "would allow respondents to circumvent the NPDES permit system").

The fact that pre-emption is not triggered by the CWA's non-point source provisions is underscored by a simple review of the factors that led the Supreme Court in *International Paper* to find pre-emption by the CWA point source provisions, and a comparison of those factors with the CWA non-point source provisions. The factors that the Supreme Court considered in finding pre-emption by the CWA point source provisions included: (1) that the CWA established "a federal permit program designed to regulate the discharge of polluting effluents," *International Paper,* 107 S.Ct. at 810; (2) that the CWA provided for "an elaborate permit system that sets

clear standards," *International Paper,* 107 S.Ct. at 814; (3) that the CWA "set[] forth the procedures for obtaining a permit in great detail," *International Paper,* 107 S.Ct. at 811-12; and (4) that the CWA "provides its own remedies, including civil and criminal fines for permit violations . . . ," *International Paper,* 107 S.Ct. at 812. As the Supreme Court explained in finding pre-emption by the CWA: "It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure." *International Paper,* 107 S.Ct. at 814.[11]

In contrast to the point source provisions, however, (1) the CWA does not establish a permit program designed to regulate non-point source pollution, let alone an "elaborate" one with "clear standards;" (2) the CWA does not set forth procedures for obtaining a permit for non-point source pollution "in great detail" because, of course, the CWA does not establish a permit program designed to regulate non-point source pollution; and (3) the CWA does not provide any remedies for violations of non-point source pollution permits because, again, the CWA does not establish a permit program designed to regulate non-point source pollution.

There are two final points which must be kept in mind when evaluating the reach of the *International Paper* holding. The first of these points is that *International Paper* was a case addressing point source pollution. *See International Paper*, 107 S.Ct. at 808, fn. 4 ("It is not disputed that IPC is a point source within the meaning of the Act"). *International Paper* simply

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[11] Notably, "[t]he CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act. The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State." *International Paper,* 107 S.Ct. at 814 (emphasis in original). Thus, as explained above, the State's claims arising out of point source discharges in Arkansas and causing injury and damages in Oklahoma may be brought under Arkansas nuisance law.

did not address non-point source pollution.[12] Which leads to the second point: *International Paper* was decided before the enactment of the 1987 amendments to the CWA which added the provisions addressing non-point source pollution that Defendant Tyson Foods apparently believes triggers pre-emption of the claims at issue. Thus, any suggestion that *International Paper* holds that the CWA has any pre-emptive effect on state regulation of non-point source pollution is simply a misstatement of the law. At most, *International Paper* provides the analytical framework for determining the pre-emptive effect (or more accurately, the lack of pre-emptive effect) of the CWA. And, as shown above, using this analytical framework it is abundantly clear that the CWA's point-source pollution program is mandatory and comprehensive, while the CWA's non-point source pollution program is optional and limited. Therefore, application of affected-state law to source-state non-point sources is not pre-empted.

The conclusion that the CWA does not pre-empt counts 4, 6, 7 and 9 of the FAC as to non-point sources in Arkansas causing injury and damage to those portions of the IRW in Oklahoma of course does not in and of itself end the analysis. Rather, the next step in the analysis is a choice of law analysis. Fortunately, however, that analysis is straightforward and strongly points to the conclusion that Oklahoma law applies to each of these counts.[13]

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[12] The Supreme Court has never directly addressed the question of the pre-emptive effect (or, more appropriately, the lack thereof) of the CWA as pertains to non-point source pollution.

[13] Defendant Tyson Foods has not raised the choice of law issue. Indeed, implicit in its moving papers is the assumption that, but for its Commerce Clause and Due Process Clause arguments, Oklahoma law would properly apply to non-point source pollution emanating from Arkansas and causing injury and damages in Oklahoma. As demonstrated below, however, Defendant Tyson Foods' Commerce Clause and Due Process Clause arguments both fail as a matter of law.

3. Applicable choice of law principles call for the application of Oklahoma law to non-point pollution emanating from Arkansas and causing injury and damage in Oklahoma

Oklahoma applies the "most significant relationship test" set forth in the *Restatement (Second) of Conflict of Laws* in determining choice of law issues. *See Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 619-620 (10th Cir. 1998) *citing Beard v. Viene*, 826 P.2d 990, 995 (Okla. 1999); *Brickner v. Gooden*, 525 P.2d 632, 637 (Okla. 1974). The Supreme Court of Oklahoma explained, "the rights and liabilities of parties with respect to a particular issue in tort shall be determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties." *Brickner*, 525 P.2d at 637. The factors to be evaluated, according to their relative importance with respect to a particular tort are: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties occurred. *See Brickner*, 525 P.2d at 637. Importantly, the Supreme Court of Oklahoma has stated that "we can think of no greater 'significant contact' than where a state or its political subdivision" is involved in a case. *Beard*, 826 P.2d at 996. For the reasons set forth below, Oklahoma courts would apply Oklahoma law to the three state common law claims alleged in this case: nuisance, trespass, and unjust enrichment.

Under the most significant relationship test, Oklahoma law applies to the State's nuisance claim against Defendant Tyson Foods. *Restatement (Second) of Conflict of Laws*, § 147 provides the general rule under the most significant relationship test: "In an action for injury to land or other tangible thing, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more

significant relationship . . . ." *Accord Edwards v. McKee*, 76 P.3d 73, 76 (Okla. Civ. App. 2003) ("in accord with the Restatement of Conflicts analysis, the law of the place of the injury applies unless some other state has a more significant relationship to the occurrence and the parties") (*citing Brickner*) (personal injury case). Comment e to *Restatement (Second) of Conflict of Laws*, § 147 further explains that "the local law of the state where the injury occurred to the tangible thing will usually be applied to determine most issues involving the tort . . . on the rare occasions when the conduct and the resulting injury to the thing occur in different states." Such should be the case here.

As to the first factor, the place where the injury occurred, the State's nuisance claim against Defendant Tyson Foods alleges that its poultry waste practices have caused injury to the property interests of the State of Oklahoma within the State of Oklahoma by invading, interfering with and impairing the State's and the public's beneficial use and enjoyment of the IRW. *See* FAC, ¶ 99. While much of the conduct causing this injury – namely, Defendant Tyson Foods' improper poultry waste disposal practices – has admittedly occurred in Arkansas, such conduct has also occurred in Oklahoma, thereby diminishing the weight to be given to the place-of-the-conduct factor.[14] As to the third factor, the citizenship of the parties, the plaintiff is the State of Oklahoma itself, which as previously noted is the most significant contact possible with Oklahoma. *See Beard*, 826 P.2d at 996 ("we can think of no greater 'significant contact' than where a state or its political subdivision" is involved in a case). Defendant Tyson Foods, in contrast, is a Delaware corporation with its principal place of business in Arkansas, *see* FAC, ¶ 6, and thus is a dual-citizen. *See, e.g.*, 28 U.S.C. § 1332(c)(1). Finally, as to the relationship

[14] There, of course, can be no dispute that Oklahoma law would apply to Defendant Tyson Foods' improper poultry waste disposal practices occurring in Oklahoma and causing injury and damages in Oklahoma.

between the State and Defendant Tyson Foods, there is none that is relevant to this claim, and as such this fourth factor is not applicable to the analysis. *See, e.g., Beard*, 826 P.2d at 996 (finding under the facts that fourth factor is "wholly irrelevant to the present inquiry").

As explained in Comment c to *Restatement (Second) of Conflict of Laws*, § 147, "[t]he likelihood that some state other than that where the injury occurred is the state of most significant relationship is greater in those relatively rare situations where, with respect to the particular issue, the state of injury bears little relation to the occurrence, the thing and the parties." The facts of this case indicate that this is plainly not one of those "relatively rare situations." The property interest injured is sited in Oklahoma. The injury to this Oklahoma property interest has occurred in Oklahoma. The State of Oklahoma is itself a party. No other state has equal or greater significant relationships to the state law nuisance claim than Oklahoma. Thus, Oklahoma law applies to all aspects of the State's nuisance claim against Defendant Tyson Foods.

The choice of law analysis under the significant relationship test as to the State's claim against Defendant Tyson Foods for trespass yields an identical conclusion: Oklahoma law applies. The State has alleged that Defendant Tyson Foods' waste disposal practices resulted in an actual and physical invasion of and interference with the State's property interests in the IRW. *See* FAC, ¶ 120. Thus, the place where the trespass injury occurred is in that portion of the IRW located in Oklahoma. The conduct at issue occurred in both Oklahoma and Arkansas. As mentioned above, the plaintiff is the State of Oklahoma itself, which is the most significant contact possible, *see Beard*, 826 P.2d at 996, while Tyson spreads its citizenship between two states, Delaware and Arkansas. FAC, ¶ 6. And, again, the factor as to where the parties' relationship occurred is wholly irrelevant to the present inquiry. Thus, no other state has equal or

greater significant relationships to the state law trespass claim than Oklahoma. Oklahoma law therefore applies to all aspects of the State's trespass claim against Defendant Tyson Foods.

Finally, for similar reasons, Oklahoma law applies to the State's claim for unjust enrichment against Defendant Tyson Foods. The gravamen of this claim is that Defendant Tyson Foods has benefited, without the permission of the State, by using the lands and waters of the IRW in Oklahoma as a disposal site for its poultry waste, and Defendant Tyson Foods has thereby been unjustly enriched. *See* FAC, ¶¶ 142-46. *Restatement (Second) of Conflict of Laws*, § 452 provides that "[t]he law of a place where a benefit is conferred determines whether the conferring of the benefit creates a right against the recipient to have compensation." Similarly, *Restatement (Second) of Conflict of Laws*, § 453 provides that "[w]hen a person is alleged to have been unjustly enriched, the law of the place of the enrichment determines whether he is under a duty to repay the amount by which he is enriched." The benefit has been conferred on Defendant Tyson Foods in Oklahoma and Defendant Tyson Foods has been enriched in Oklahoma. Accordingly, Oklahoma law applies to all aspects of the State's unjust enrichment claim against Defendant Tyson Foods.

4. Application of Oklahoma law to non-point pollution emanating from Arkansas and causing injury and damage in Oklahoma neither violates the Commerce Clause nor the Sovereignty of Arkansas

Where the choice of law analysis, as it does here, properly calls for the application of affected-state law to source-state polluters where non-point source pollution is at issue, the application of affected-state law does not constitute "an impermissible attempt at extraterritorial regulation."

a. Commerce Clause

Defendant Tyson Foods contends that the application in this lawsuit of Oklahoma law to non-point source pollution emanating from Arkansas and causing injury and damages in Oklahoma constitutes state regulatory action having the practical effect of regulating interstate commerce, and thereby violates the dormant Commerce Clause. U.S. Const., art. I, § 8. Defendant Tyson Foods' contention is unsupported by the law and should be rejected.[15]

To determine whether state regulation is barred by the Commerce Clause, courts must apply the following analysis: Where state law acts "even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church Inc.*, 90 S.Ct. 844, 847 (1970).[16]

At the outset, it is important to note that the plain language of counts 8 and 9 of the FAC asserts claims based on Oklahoma statutes and regulations -- but only as to "those [wrongful waste disposal] practices that occurred in Oklahoma." *See* FAC, ¶¶ 134, 135 & 138 (emphasis added). Therefore, dormant Commerce Clause concerns are plainly not implicated by these two counts. As regards the remaining counts at issue, there are two types of claims raised. Counts 4,

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[15] The State does not dispute that hazardous and / or solid waste -- which is what the State alleges poultry waste to be -- is an article of commerce. *See Blue Circle Cement, Inc. v. Board of Commissioners of the County of Rogers*, 27 F.3d 1499, 1510 fn. 12 (10th Cir. 1994).

[16] The Tyson Motion curiously fails to even mention, let alone apply, the *Pike* test in its moving papers. *See Blue Circle Cement*, 27 F.3d at 1511 ("When interstate discrimination is not involved, we assess a dormant Commerce Clause challenge to a local measure under the *Pike* balancing test").

6 and 10 of the FAC raise claims sounding in state common law. Count 7 of the FAC raises a claim alleging violations of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1.[17]

As to those of the State's counts sounding in state common law, *see* FAC, Counts 4, 6 & 10, it is doubtful that a dormant Commerce Clause analysis is even appropriate. Indeed, each of the cases relied upon by Defendant Tyson Foods for support of its argument is based upon positive law -- specifically, statutes or regulations. *See Healy v. Beer Institute*, 109 S.Ct. 2491 (1989) (addressing a Connecticut statute); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S.Ct. 2080 (1986) (addressing a New York statute); *Edgar v. MITE Corp.*, 102 S.Ct. 2629 (1982) (addressing an Illinois statute); *Baldwin v. Seelig*, 55 S.Ct. 497 (1935) (addressing a New York statute). *CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987), however, provides that "[t]he principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." (Emphasis added.) As explained in *Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F.Supp.2d 245, 254 (D.N.J. 2000), "[t]he applicability of the dormant commerce clause to causes of action under state tort law is unsettled. Typically, the cases focusing on the commerce clause have considered state statutes or regulations, not lawsuits." Indeed, the *Camden County* Court noted that "the Third Circuit has voiced doubt that suits brought under state common law can ever be subject to dormant commerce clause analysis." 123 F.Supp.2d at 254. *See also NAACP v. Acusport, Inc.* 271 F.Supp.2d 435, 464 (E.D.N.Y. 2003) ("The Commerce Clause is not designed to prevent

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[17] 2 Okla. Stat. § 2-18.1, by its language, is limited in its application to only those persons subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry, and accordingly the State is not seeking to apply this statute to non-point pollution emanating from Arkansas and causing injury and damages in Oklahoma. In contrast, 27A Okla. Stat. § 2-6-105 contains no such restriction, and accordingly the State is seeking to apply this statute to non-point pollution emanating from Arkansas and causing injury and damages in Oklahoma.

individual states from protecting those within the state from tortious action by those engaged in commerce whose products or activities put the state's citizens at risk"); *City of New York v. Beretta U.S.A. Corp.*, 315 F.Supp.2d 256, 285 (E.D.N.Y. 2004) (Commerce Clause "should not be used to immunize out-of-state actors from the legitimate reach of a state's tort and nuisance doctrine") (citations omitted); *Crowley v. Cybersource Corp.*, 166 F.Supp.2d 1263, 1272 (N.D. Cal. 2001) (rejecting argument that state law tort claims violated dormant Commerce Clause). Thus, it is the State's position that a dormant Commerce Clause analysis of the State's Oklahoma common law claims is not appropriate.

In any event, even were it determined that such an analysis were appropriate, it would be clear that under the *Pike* test Oklahoma state law does indeed apply even-handedly to both Oklahoma and Arkansas polluters[18] and would "effectuate a legitimate local public interest" – namely the prevention of pollution of the waters of Oklahoma.[19] As to the third prong of the *Pike* test, Defendant Tyson Foods has come forward with no evidence that any burden that might be imposed on interstate commerce "is clearly excessive in relation to the putative local benefits." *See American Target*, 199 F.3d at 1254 ("The party challenging a statute that regulates evenhandedly bears the burden of proving the statute's excess"); *see also, e.g., Acusport*, 271 F.Supp.2d at 464 ("The Commerce Clause furnishes no defense under the circumstances of the instant case to conduct occurring inside and outside the state that causes a public nuisance within

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[18] A state regulation "regulates even-handedly" where it "does not distinguish between in-state and out-of-state businesses." *See American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1254 (10th Cir. 2000). There is no assertion by Defendant Tyson Foods that Oklahoma common law does not apply even-handedly.

[19] *See Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993) ("[I]t is clear that a state may sue to protect its citizens against 'the pollution of the air over its territory; or of interstate waters in which the state has rights'") (citation omitted); *Spiva v. State of Oklahoma,* 584 P.2d 1355, 1360 (Okla. Crim. App. 1978) ("That the State has a valid interest in matters which affect the public health, safety and general welfare is undisputed . . .").

the state; any burden placed on interstate commerce is far outweighed by the substantial positive effect on the New York public's health and safety that more scrupulous supervision of the sale of their handguns by gun manufacturers and distributors would have"); *Stone v. Frontier Airlines Inc.*, 256 F.Supp.2d 28, 46 (D. Mass. 2002) (rejecting argument that dormant Commerce Clause precludes state tort law from regulating any activity that, while having local effects, also effectuates some external consequence, explaining that "[t]he reductio as absurdum of this reasoning, however, is an evisceration of state tort law because almost every activity a state regulates has some 'extraterritorial effects'"). Accordingly, Rule 12(b)(6) dismissal is improper. *See, e.g., Camden County*, 123 F.Supp.2d at 255 (denying dismissal on dormant commerce clause grounds, holding that "[a]t the motion to dismiss stage . . . the Court cannot assess the relative burdens and benefits of the County's claims without a more fully developed record"); *City of New York*, 315 F.Supp.2d at 286 ("Objections that particular provisions of the injunctive relief requested place an impermissible burden on interstate commerce can be considered on a case-by-case basis in a subsequent phase of this litigation if it becomes necessary to do so").

Applying the *Pike* test to count 7 of the FAC (wherein Oklahoma statutory claim under 27A Okla. Stat. § 2-6-105 is asserted), it is similarly clear that dormant Commerce Clause concerns are not implicated. This statute, too, applies even-handedly and effectuates a legitimate local public interest. And, as before, Defendant Tyson Foods has come forward with no evidence that any burden that might be imposed on interstate commerce is clearly excessive in relation to the putative local benefits. *See, e.g., Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978) (overruling Commerce Clause attack on Oklahoma Consumer Credit Code, explaining that "states can, of course, pass Acts which affect commerce unless the burden so imposed greatly exceeds the extent of the local benefits").

b. "Sovereignty"

Defendant Tyson Foods' argument that application of Oklahoma law to non-point pollution emanating from Arkansas and causing injury and damage in Oklahoma violates the sovereignty of Arkansas is essentially a Due Process argument.[20] However, it is a Due Process argument that fails because under controlling Supreme Court precedent application of Oklahoma law is constitutionally permissible.

The leading case on choice of law in this context is *Allstate Insurance Company v. Hague*, 101 S.Ct. 633 (1981) (plurality opinion), wherein the Supreme Court set forth the following test: "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 101 S.Ct. at 640.[21] In fact, within these bounds, there is great Constitutional latitude. *See Shutts*, 105 S.Ct. at 2980 ("we reaffirm our observation that in many situations a state court may be free to apply one of several choices of law"). There can be no dispute that "significant relationship" choice of law analysis adopted by the Oklahoma Supreme Court in *Brickner* fully comports the dictates of *Allstate*.

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[20] To the extent it is not a Due Process argument, Defendant Tyson Foods is without standing to raise alleged (and in this case illusory) violations of the sovereignty of Arkansas. As explained by the Supreme Court, ". . . this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 95 S.Ct. 2197, 2205 (1975). In any event, "[t]he conflict with the sovereignty of the defendant's state is not a very significant factor in cases involving only U.S. citizens; conflicting policies between states are settled through choice of law analysis, not through loss of jurisdiction." *Brand v. Menlove Dodge*, 796 F.2d 1070, 1076 fn. 5 (9th Cir. 1986).

[21] As noted in *Philips Petroleum Company v. Shutts*, 105 S.Ct. 2965, 1978 (1985), even "the dissenting Justices [in *Allstate*] were in substantial agreement with this principle."

As noted in *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589, 1597-98 (1996), a state does not have the power to punish a company for conduct that was lawful where it occurred and that had no impact on the state or its residents. The obvious corollary to this pronouncement in *Gore* is that a state does have the power to punish a company for conduct that was lawful where it occurred but that did have an impact on the state or its residents. Such is precisely the case here. While not conceding that the Poultry Integrator Defendants' conduct in Arkansas was in fact lawful, the State's efforts to hold the Poultry Integrator Defendants liable under Oklahoma law for their conduct that has injured the State is fully consistent with Due Process Clause principles.[22]

B. With respect to point and non-point source pollution originating in Oklahoma, the CWA does not pre-empt the State's claims based on Oklahoma law

As noted in section III.A.1 above, relying upon the CWA saving clause found at 33 U.S.C. §§ 1370 & 1365(e),[23] "nothing in the Act bars aggrieved individuals from bringing a

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[22] In fact, this is what occurs in lawsuits on a daily basis. For example, in a product liability lawsuit, irrespective of the legality of the product manufacturer's conduct in its own state, if that product, through the channels of commerce, enters Oklahoma and injures an Oklahoma citizen, the Due Process Clause fully allows the injured Oklahoman to sue the manufacturer for the manufacturing or design defect – conduct which occurred in the manufacturer's own state – pursuant to Oklahoma law.

[23] 33 U.S.C. § 1370 provides:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard,

nuisance claim pursuant to the law of the source State." *International Paper*, 107 S.Ct. at 814 (emphasis in original). Thus, as pertains to point source pollution originating in Oklahoma and causing injury and damages in Oklahoma, application of Oklahoma law is not pre-empted.

Inasmuch as the discussion in section A.2 above establishes that the CWA does not in any circumstance pre-empt application of affected-state law to non-point source pollution, there is no need to even resort to the CWA saving clause. Simply put, as pertains to non-point source pollution originating in Oklahoma and causing injury and damages in Oklahoma, application of Oklahoma law is not pre-empted.

C. With respect to non-point pollution emanating from Arkansas and causing injury and damage in Oklahoma, the CWA has not displaced the federal common law of nuisance

The State has asserted nuisance claims founded on both state and federal law. *See* FAC, Counts 4 & 5. The State acknowledges the Supreme Court's statement that "[i]f state law can be applied, there is not need for federal common law; if federal common law exists, it is because state law cannot be used." *Milwaukee II*, 101 S.Ct. at 1791 fn. 7.[24] Subject to this condition, the State asserts that the federal common law has not been displaced by the CWA with respect to

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> prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1365(e) provides:

> (e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

[24] In any event, even where the federal common law of nuisance applies, "consideration of state standards may be relevant." *Illinois v. City of Milwaukee ("Milwaukee I")*, 92 S.Ct. 1385, 1395 (1972).

non-point source pollution emanating from Arkansas and causing injury and damage in Oklahoma.

There can be no dispute that prior to its amendment in 1972 the CWA did not pre-empt the federal common law of nuisance. *Milwaukee I*, 92 S.Ct. at 1393 ("The application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act"). When faced with the CWA as amended by the 1972 amendments, however, the Supreme Court stated that: "We conclude that, at least so far as concerns the claims of respondents, Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Milwaukee II*, 101 S.Ct. at 1972 (emphasis added). *Milwaukee II* involved solely claims pertaining to point source pollution. *See Milwaukee II*, 101 S.Ct. at 1973 fn. 11 ("There is no question that all of the discharges involved in this case are point source discharges").

In reaching its conclusion, the Supreme Court explained the analytical framework thusly: "[T]he question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." *Milwaukee II*, 101 S.Ct. at 1792, fn. 8.

The Supreme Court then proceeded to assess the scope of the 1972 amendments to the CWA, noting that "Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation. Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus

established by Congress to achieve its goals." *Milwaukee II*, 101 S.Ct. at 1793 (emphasis in original). Indeed, the Supreme Court's analysis in *Milwaukee II* was centered entirely on the point source pollution permitting program. *See generally Milwaukee II*, 101 S.Ct. at 1794-97. Concluded the Supreme Court: "There is thus no question that the problem of effluent limitations has been thoroughly addressed through the administrative scheme established by Congress, as contemplated by Congress. This being so there is no basis for a federal court to impose more stringent limitations than those imposed under the regulatory regime by reference to federal common law . . . ." *Milwaukee II*, 101 S.Ct. at 1794.[25]

In contrast, the issue of non-point source pollution has not been "thoroughly addressed through the administrative scheme established by Congress." Accordingly, there is indeed a indeed for a federal court to impose limitations by reference to federal common law. Thus, the federal common law of nuisance has not been displaced by the CWA with respect to interstate non-point source pollution.

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[25] As reflected by its definition in the CWA, the term "effluent limitations" is restricted to point sources. *See* 33 U.S.C. § 1362(11) ("The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance").

IV. Conclusion

WHEREFORE, premises considered, Defendant Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint should be denied.

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November 18, 2005

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2005, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of Court will transmit a Notice of Electronic filing to the following ECF registrants:

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